A BRIEF HISTORY OF THE PAROL EVIDENCE RULE.

In the following pages an attempt is made to trace the history of that part of the Parol Evidence rule which declares that a written memorial of a transaction is not disputable by the parties as to the terms of the transaction. There are of course other parts to the rule generally known by that name. The so-called Parol Evidence rule in truth deals not with a rule of evidence, but with the nature of legal acts.[1] The various aspects of legal acts which it involves may be distinguished under four heads: (1) the Creation of a legal act; (2) its Integration (or reduction to writing); (3) its Solemnization; (4) and its Interpretation. The first of these concerns chiefly the problems of delivery, as completing the act, and of intent or mistake, as affecting the bindingness of the act. The second concerns the conclusiveness of the writing, as solely embodying the terms of the act. The third concerns the necessity of such formalities as writing, sealing, signing, and attestation. The fourth concerns the application of the terms of the act to external objects. In all of these the term "parol evidence rule" is more or less constantly employed. But it is with the second alone that we are here concerned. The inquiry is this: *The modern rule being that when the parties have embodied a transaction in a document, the writing is indisputable as to the terms of the transaction, how far back in our history does this rule go, and what were the circumstances of its origin and development?*

It might have been supposed that this great principle of our law had come down to us as a continuous tradition from the earliest days. The indisputability of a writing's terms seems to harmonize with that rigid formalism of primitive days which is elsewhere in the law constantly observable. Resting though it does now on a rational foundation of experience and policy, did it not nevertheless exist, even at the very beginning, as a natural part of the

[1] Thayer, Preliminary Treatise on Evidence, c. 10; Greenleaf on Evidence, 16th ed., 305*a*.

earlier system? Curiously enough, its history is quite the contrary. Our primitive system knew it not. Only towards the end of the middle ages does it come into being; and only in fairly modern times does it gain complete recognition. Its history falls, by a rough division, into three periods, I from primitive times till the vogue of the seal, in the 1200s; II then, on English soil, till the statute of frauds and perjuries, in 1678; III and thence, its modern recognition.

I. [2] In the primitive Germanic notions of the time of the barbarian invasions and under the Merovingian and Carlovingian monarchies, there was certainly no notion of the indisputability of the terms of a document. This is explained, and was indeed predetermined, by the character of the civilization of those peoples. When the Germanic tribes spread west and south, and absorbed the Roman territories in Gaul, Spain, and Northern Italy, they brought with them two marked traits,—an ignorance of letters, and a legal system of formal oral transactions. They found writing in use among the Romanized peoples, and (in Italy at least) an advanced habit of transaction by notarial documents; and this they in part fell in with. But it remained alien to their own ideas; and after the dissolution of the Carlovingian empire and the subsidence of Romanesque in-

[2] The materials for this first part of the story are to be gleaned from the following works: 1877–8, Ficker, Beiträge zur Urkundenlehre; 1887, Posse, Die Lehre von Privaturkunden; 1889, Bresslau, Handbuch der Urkundenlehre für Deutschland und Italien, I, 476–555; 1887–92, Brunner, Deutsche Rechtsgeschichte (based upon earlier separate essays by the same author, especially his Rechtsgeschichte der römischen und germanischen Urkunden); 1903, Brunner, Grundzüge der deutschen Rechtsgeschichte (confirming his earlier results); 1885, Heusler, Institutionen des deutschen Privatrechts; 1895, A. S. Schultze, Zur Lehre vom Urkundenbeweise, Zeitschrift für das Privat und Oeffentliches Recht, XXII, 70; 1898, Déclareuil, Les preuves judiciaires dans le droit franc, du V au VII siècle, in Nouv. revue Hist. du droit fr. et etrang. XXI, 220, 747, 757 (independently reaching results in harmony with the German scholars); 1902, Schroeder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed., 361, 698. All these scholars are in substantial agreement upon the historical facts to be referred to. Pertile (Storia del diritto italiano, ed. 1900, VI, pt. 1, pp. 417–419) is in accord as to the main points, yet does not notice the importance of the seal; but in Italy the early vogue of notaries gave a different turn to the story of its local law. Stouff (Etude sur la formation des contrats par l' écriture dans le droit des formules du Ve au XIIe siècle; Nouvelle revue hist. de droit, XI, 249; 1887) ignores entirely the historical place of the seal; but Bresslau and Posse had not at that date published their researches copiously confirming Ficker's.

fluence (say, by the 900s), the alien element that had found entrance was excised, and the development of their native system proceeded on its own main lines.[3] The document, then, even in its most definite type (*carta*), is in the Germanic system merely one of the symbols that entered into the formalism of the transaction, and, like the wand, the glove, and the knife, has an efficacy independent of its written tenor,—which indeed could mean nothing to the parties who employed it:

[4] "In the legal affairs of a people who, from the lowest churl to the great Emperor Charles, were unskilled alike in reading and in writing, the written document could have but a precarious position, and its acceptance into legal practice was opposed by all sorts of obstacles,—in particular, by an almost ineradicable distrust of everything written, which they feared with the fear of a man who stands weaponless and helpless. For us moderns a written document is quite another thing than for the Germanic tribes, confronted with it yet not comprehending it. Nowadays, our documents of debt, or the like, we write ourselves, or at least sign them after perusal; we are masters of them, and we know that the thing we have written or signed is precisely what it is, and no fearsome mysterious thing. Quite otherwise with the Germanic peoples, confronted with the alien practice of legal writings, upon their invasions of Roman regions. The grantor of land, the borrower of money, could neither read nor write the document which might be executed in his name; he could but mark his cross at the bottom and hope that all was right. Thus we hear, even in the early 1200s, a certain bailiff of the abbey of Pruem, in a litigation with the abbey before Henry IV, scornfully protesting, when the abbey produces a royal charter against him, that a partisan scribe could indite whatever he might please to invent ('*irridens testamenta, dicens quod penna cuiuslibet quelibet notare posset, non ideo suum jus amittere deberet*'). So too, in even a later age, there was an almost proverbial verse[5] which ran, 'On parchment scribes may place with ease, Exactly what their own minds please.' It is, in short, easy to imagine the mistrust which must in those days have attached itself to the written document. * * * The truth is that the legal value of the *carta* consisted in this, that by means of it the legal transaction was completed. * * * The grantor of a piece of land could transfer it in the ancient national form of *sale* and *vestitura*, or he could now accomplish the transfer by means of the document ('*per cartam venditionis*'), and the *traditio per cartam* effected the transfer of ownership, just as before this, the *sale* had done. * * * Thus the *traditio cartæ* was itself a formal act. The act of delivery of the document was performed by the maker grasping the still blank parchment, lifting it from the

[3] Ficker, I, 83–88; Brunner, R. G., I, 399, II, 420; id., Grundz, 41, 119; Pollock & Maitland, II, 88–190.

[4] Heusler, I, 86. [5] Konrad von Würzburg, Schwanritter, l. 571.

earth (in land transfers at least, by Frankish usage), calling upon the witnesses to grasp it with him, handing it to the scribe to fill out the writing, and, after signatures affixed, delivering it to the grantee."

In this stage, then, the *carta* merely plays a convenient part, first, by enabling the formal delivery of the land to be made symbolically away from the premises, and, next, by preserving against future forgetfulness the names of the witnesses.[6] The important and unquestionable fact is that the tenor of the writing *does not legally and bindingly establish anything.*[7] If the truth of its statements is disputed—the amount of money loaned, the area of land conveyed, the conditions annexed—, the terms of the transaction may and must be proved by calling the witnesses to it, regardless of any contradiction of the writing.[8] The attendant witnesses continued to be, as they had been, the main reliance for the proof of a disputed transaction. The procedure for disputing by the witnesses' oaths the correctness of the document was elaborate and well-settled, and its ultimate settlement might turn upon a wager of battle. How long was the persistence of this subsidiary status of the document, and how continuous the connection between Germanic usage and early Anglo-Norman legal ideas, may be seen from the following record of English litigation two hundred years after the Conquest:

1292, *Anon.*, Year Book 20 Edw. I, 258 (Horwood's ed.): "A brought the mordancester against B, on the death of his father, for tenements in C.; and he prayed the assise.—B. 'There ought not to be an assise: for see here your father's charter, by which he enfeoffed us and put us in good seisin. Judgment if there ought to be an assise.'—A. 'I admit perfectly that the charter is the deed of my father; but I tell you that he gave you the tenements by that charter upon these terms, viz., that you should hold it for one month, and that at the end of the month you should espouse his daughter Emma; and that if you did not, the land should revert to him and his heirs. Now, he died within the month, and at the end of the month you would not marry his daughter; therefore we pray judgment if there ought not to be an assise.'—B. 'You have admitted the charter, which is

[6] Ficker, I, 85; Bresslau, I, 729, 730.

[7] Ficker, 82 ff; Brunner, R. G., I, 393, II, 420; *id.*, Grundz, 76, 119, 159; Heusler, I, 91; Déclareuil, 757; Bresslau, 483, 500, 799; Schultze, 101; Pertile, 417; Glasson, Hist. du droit et des inst. de la France, III, 503.

[8] "That the probative value of a document lay only in its witnesses may be gathered from the fact that the word *urkunde* meant nothing else than 'witness'." Schroeder, 361; so Brunner, R. G. II, 391.

simple and unconditional. Judgment if there ought to be an assise.'—A. 'Whatever the words of the charter may be, such was the covenant between my father and his friends and your friends; ready &c.'—B. 'The reverse.—Therefore to the country.'—The Jurors said that such was the contract even as A said; and that his father died within the month.—They were asked if he died seised in his demesne as of fee.—The Jurors. 'We pray your assistance.'—The Justice. 'And inasmuch as it is found that the estate of B was conditional, which condition was not specifically performed, by reason of the default of B., and therefore his seisin was null.'" [9]

II. The *rise of the seal* brings a new era for written documents, not merely by furnishing them with a means of authenticating genuineness, but also by rendering them indisputable as to the terms of the transaction and thus dispensing with the summoning of witnesses. The vogue of the seal and of the transaction-witness wax and wane, the one relatively to the other.[10] This legal value of the seal was the result of a practice working from above downwards, from the king to the people at large. It is involved, in the beginning, with the principle that the king's word is indisputable. Who gives him the lie, forfeits life. The king's seal to a document makes the truth of the document incontestable. This leads, along another line, to the modern doctrine of the verity of judicial records,—to be noticed later. Here, for private men's documents, its significance is that the indisputability of a document sealed by the king marked it with an extraordinary quality, much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it. First, a few counts and bishops acquire seals; and then their courtesies are sought in lending the impress and guarantee of their seal to some document of an inferior person, as serving him in future instead of witnesses.[11] Finally, the ordinary freeman comes usually to have a seal; and his seal too makes a document indisputable—at least, by himself. This extension of the

[9] Another case of a similar sort is cited by Professor Thayer (Preliminary Treatise on Evidence, 105) from Forsyth, who cites from Jocelyn de Brakelonde. About the 1300s, the following passage also is found: Mirror of Justices, ubi infra, pp. 75, 115, 152, 163 ("a charter is vicious if it testifies that a gift has been made, whereas as yet there has been no delivery of seisin").

[10] Ficker, I, 94, 95, 106, 107, 115; Bresslau, 510–549; Brunner, R. G., I, 393, II, 420, 523.

[11] Ficker, 94.

seal begins in the 1000s, and is completed by the 1200s.[12] Thus the old regime of proof by transaction-witnesses disappears by degrees; by the 1300s they are almost superfluous.[13] This means that when a transaction has been made by writing, the parties rely for their future proof not on witnesses called in at the time of the transaction, but on the opponent's seal found affixed to the document, which thereby makes its terms indisputable by him as representing the actual terms of the transaction between the parties.[14]

The tool for shaping the new doctrine had now been supplied; and it remained to develop and extend the doctrine. Here it must be remembered that in Anglo-Norman times people are still, on the whole, unfamiliar with writing, and that the chief varieties of transaction—namely, those affecting land—are still practised with oral forms;[15] the essential, working conception is the livery of seisin, not the charter. Whatever virtue there is in the writing is testimonial only. It furnishes one sort of proof; but it is not a necessary kind of proof, and the main thing is something done apart from the writing. "This indenture" merely

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[12] Ficker, 91, 97; Bresslau, 534 ("by the second half of the 1200s even ordinary burgers seal their documents"); Holmes, The Common Law, 272; Pollock and Maitland, II, 221 ("at the date of the Conquest the Norman duke has a seal, and his cousin the late King of England had a seal; * * * before the end of the thirteenth century the free and lawful man usually had a seal").

[13] Ficker, 95–97; Bresslau, 545. The course of thought is seen in the attribution of the qualities of a witness to the seal, as in a much quoted passage of the Schwabenspiegel, c. 34, § 2: "Hilfet ein toter geziuge [i. e. die briefe] als wol dir als ein lebendiger" (Schultze, 119).

[14] Ficker, 82–91; Bresslau, 546 ("there is therefore no counter-proof allowable against the statements of fact [*den sachlichen Bericht*] in a sealed document"); id. 539 ("as a first principle of the law for documentary proof in Germany after the 1200s, it may be considered * * [exceptions excepted] that the sealing was an indispensable requirement for the legal evidential force of a document, no matter who was its author"); Schroeder, 701; Schultze, 103, 118. This was long ago noted by Mr. Justice Holmes for English law: 1881, The Common Law, 272. Space does not suffice to note the very interesting stages of progress, pointed out by Ficker and Bresslau, by which this result was reached. The indenture or chirograph of the Anglo-Saxons was one of the intermediate expedients for securing genuineness and conclusiveness. But the seal proved its superiority for the latter purpose, and finally prevailed.

[15] Pollock & Maitland, II, 83, 93, 202, 217.

"witnesseth"; and the now time-worn phrase was once the actual conception.[16]

So long as this notion of the operative element of transactions persisted, it must oppose a constant obstacle to the progress of the idea of an indisputable sealed document. Since the writing is not the vital thing, why yield to its terms? And so for two centuries or more the extension and adaptation of the new idea is slow. For mercantile contracts, the advance seems to be settled by the 1300s.[17] But for land-transactions there is more tardy progress. By that time, charters (i. e. deeds) were becoming necessary accompaniments;[18] but they were not yet indisputable in every respect. For example, Littleton, about 1466, tells us[19] that where the deed is absolute and the livery of seisin was made with an oral condition, still the condition is enforceable, because "nothing of the tenements passeth by the deed, for that the condition is not comprised"; and again[20] that though, for a condition attached to the transfer of a freehold, some writing must be shown, yet "a man may be aided upon such a condition by the verdict of twelve men taken at large,"—just as the twelve men, in the

[16] The word *urkunde* signified, by etymology, "witness": *note* 8, *supra*. This was the usual conception still in the 1300s and 1400s; see the citation *supra*, note 13; and the following: Circa 1300, Mirror of Justices, b. II, c. 27, Seld. Soc. Pub. VII, 75 ("escritz tesmonials de contracts," i. e. deeds); b. III, c. 23, ib. 107, 152 ("by way of aid for men's memory are writings, charters, and muniments very necessary for to testify the conditions and the points of contracts"); 1466(?), Littleton's Tenures, sectt. 365, 371 ("un escript south seale, provent mesme la condition"); and it persists as a phrase to the time of Sheppard's Touchstone, in the 1600s: c. IV, p. 50 ("a deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed").

[17] 1368, Y. B. 41 Edw. III, 10, 6 (quoted *post*).

[18] Pollock & Maitland, II, 82, 91.

[19] Tenures, sect. 359.

[20] Ibid., sect. 366. Compare the following, in 1523: Y. B. 14 H. VIII 17, 6 and 7 (Brudnel, J.: "Such things as pass by parol, are as well by parol as written on condition; for every grant of a chattel is good on condition without writing; for a deed is nothing but a proof and testimonial of the agreement of the party,—as a deed of feoffment is nothing but a proof of the livery, for the land passes by the livery; but when the deed and the livery are joined together, that is a proof of the livery").

case (above cited) of two centuries before, aided the plaintiff by a verdict directly contradicting the deed.[21]

On the other hand, Littleton in the very same treatise[22] is mentioning as "common learning" that a plea of condition, except in some special cases, shall not defeat a freehold "unless he showeth the proof in writing." The 1400s were evidently a transition period. By the time of Coke's commentary upon Littleton and of Sheppard's Touchstone, by the 1600s, on the whole—the modern rule of indisputability is established for all transactions affecting realty.[23]

No doubt by that time the surrounding circumstances had facilitated, and judicial reflection and conscious policy had stimulated, the natural growth of the newer rule. In the first place, the community had become *more generally lettered*, and this in its turn had resulted from the spread of the printing process in the late 1400s. Reading and writing were no longer the mysterious arts of a few. It was natural to hold that a man was bound by his written version of the transaction, when he might easily guard himself against the writing's being deficient in some of the agreed terms;[24] and it was the more natural to rely wholly

[21] In a later day, this tradition is thus expounded: *Ante* 1726, Gilbert, Evidence, 84 ("Things that lie in livery may be pleaded without deed; * * so a man may plead a demise, without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract that would be good whether there were any indenture or not. * * [Livery of seisin] is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony, * * therefore if the defendant *pleads* the livery and seisin of the plaintiff, the plaintiff cannot reply that the livery was conditional, without showing the deed, inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only. But the jury are not estopped on the *general issue* from finding such a conditional feoffment, for the jury are men of the neighborhood that are supposed to be present at the solemnity * * and by consequence may exhibit the condition on the feoffment. But since the use of the solemnities before men of the country hath ceased * * therefore the statute of frauds and perjuries hath enacted that no * * [estates] shall be assigned, granted, or surrendered unless it be by deed or note in writing").

[22] Sect. 365.

[23] Yet, even in Sheppard's day, relics remain, as where he says (c. IX) that if the words of livery are to one effect and the deed to another effect, the deed is void; though if the livery is *secundum formam chartae*, any additional words of oral livery are void.

[24] E. g., Babington, J., in 1430, Y. B. 8 H. VI, 26, 15, repudiating proof of an oral condition to qualify a deed: "And it will be adjudged my own folly that I did not wish to have it written in." The contrast between this effect of the spread of letters, and the effect on the doctrine of intention or mistake, is worth noticing; in the latter aspect, it bound a man to what was *in* the deed; in the present aspect, it kept out what was *not* in the deed.

upon the writing since the dying out of old custom (due in part to jury-trial) had made transaction-witnesses not commonly available. In the second place, *mercantile custom* had already pointed the way in advance. The Lombards in London (and doubtless also—somewhat later—the Flemings and the Hansas) were employing the commercial forms which had developed with the revival of commerce in the preceding three centuries. These mercantile documents of debt had already invented the device of indisputability,—to some extent, no doubt, preserving in tradition the expedients of the advanced Roman law. Such models can be seen to have had some influence upon English ideas.[25] In the third place, the rigid *control of the jury* influenced the judges, indirectly, by leading them to keep from the jury all alleged oral transactions which might be misused by them to overturn the words of the writing. The safety of written proof was supposed to be at stake. If the parties were allowed to put in averments extraneous to the writing, it must go to the jury, and there was no telling what the jury might do; but if the judges took exclusive charge, they could better control the situation. This reasoning is not much reported till later times,[26]

[25] As early as the 1200s, this leaven is seen working; "Note that by the law merchant a man cannot wage his law against a tally": 1222, Y. B. 20 Edw. I, p. 68; and the same rule for a sealed confession of debt is put forward as late as 1460 as a "custom of London": Y. B. 39 H. VI, 34, 46, cited in Thayer, Preliminary Treatise, 394. Further illustrations are furnished in Pollock & Maitland, II, 212, 222. For this doctrine of the foreigners' commercial law, see Baldus, Consilia I, no. 48 ("Stabiles et firmæ debent esse scripturæ mercatorum,—juxta illud vulgare dictum 'quod scripsi scripsi,' quia scriptura mercatorum et campsorum habetur pro sententia et sua fide transit in rem judicatam"), quoted in Goldschmidt, Handb. des Handelsrechts, (1891) 3d ed., I, 1, p. 389, note; see also ib. 306; Franken, Das Französische Pfandrecht (1879), 258; Pertile, Storia del diritto italiano, 25 ed., 1900, VI, pt. 1, 421.

[26] The examples cited *supra*, p. 342, note 9, show how the earlier juries might make short work of deeds. A passage in Thayer, Prelim. Treat. 105, further illustrates this. It must be noted, too, as indicated in the quotation from Gilbert, *supra*, p. 345, note 21, that "the use of the solemnities of livery before men of the country" was dying out, and that so long as the vital thing had been this livery, the matter might well be left to them, but there was no reason for considering a transaction of writing as within their province.

but it was plainly there.[27] Finally, a general policy of regard for the *trustworthiness of writing*, as against the shiftiness of mere testimonial recollection, was beginning to be consciously avowed, irrespective of any discrimination against the jury. This is a distinctly modern attitude, but it emerges as one of the considerations that finally tended to fix the rule. "Thus you would avoid a matter of record by simple surmise," says Paston, J., in 1430.[28] Coke, of course, furnishes such reflections in plenty, by the time of the 1600s; "it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give but it should be controlled by collateral averments."[29] Thus a judicial legislative policy comes to reënforce the other influences.

But, meantime, what of the theory of the rule? At the outset, in the Anglo-Norman times, as already noticed, it arises merely as a testimonial rule; the writing replaces the transaction-witnesses as a mode of proof. But in its modern shape it is a constitutive rule; the writing itself is operative; the writing *is* the act, not merely one of the possible ways of proving the act. By what sequence of ideas was this transition of theory effected?

(1) At first, the new principle appears merely as a *waiver of ordinary proof*, permitting the substitution of another. The man who has sealed a document is not allowed to bring his transaction-witnesses or his compurgators to prove what the transaction really was; he has in advance waived this right. Such was the notion on the

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[27] 1610, Altham's Case, 8 Co. Rep. 155 ("It was resolved that the said foreign or collateral averment out of the said deed [setting up a prior inconsistent agreement] was not of any force or effect in the law. For every deed consists upon two parts, *scil.*, matter of fact, and upon the construction in law; matter of fact is to be averred by the party and triable by the jurors; the other, being matter in law, is to be discussed by the judges of the law"); 1659, Lawrence *v.* Dodwell, 1 Lutw. 734 (Powell, J.: "The averment should be gathered from the words of the will; it is not safe to admit a jury to try the intent of a testator"); 1708, Strode *v.* Russell, 2 Vern. 621 (in chancery; "We will consider how far it shall be allowed and how far not, after it is read; and this is not like the case of evidence to a jury, who are easily biased by it, which this Court is not").

[28] Y. B. 8 H. VI, 26, 15.

[29] 1591, Lord Cheyney's Case, 5 Co. Rep. 68*a*; 1605, Countess of Rutand's Case, ib. 26 (quoted *post*, p. 350.).

Continent;[30] and such was the first conception in England. This waiver is commonly spoken of as an "estoppel," i. e. a conception which concedes that the truth might be as alleged, and that ordinarily the party would have a right to prove it in the usual way, but that here he is "stopped" from that proof, by his own sealed act. "It does not lie in your mouth to say the obligation is not good."[31] The merely subjective effect of the seal in this respect is well illustrated by a controversy surviving in Littleton's time;[32] some lawyers thought, where a feoffment had been made, and a deed-poll given (i. e. in the single name of the feoffor, not sealed by both and indentured), naming a condition to the feoffment, that the feoffor could not take advantage of the condition; that is, because it could be used only by way of estoppel, and the feoffee was not estopped by a deed which he had not sealed; the effect being to refuse efficacy to the condition though named in the deed.[33]

(2) Alongside of this theory, but playing gradually a more important part, was the theory that a transaction of one "nature" cannot be overturned by *anything of an inferior "nature."* This is the real lever which helps on the progress to the modern idea. But it appears early, and apparently as a borrowing from the Roman law.[34] It has broad aspects, and is responsible for some other rules, now mostly abandoned,—such as the rule that the oral payment of a

[30] Ficker, I, 93.

[31] 1368, Y. B. 41 Edw. III, 10, 6. So also in 1460: Y. B. 39 H. VI, 34, 46: "If I bring a writ of debt, and count that the defendant bought of me a horse for 10£, and he wishes to wage his law, I may estop him by the specialty proving the said contract; the same law of a receipt,—if he wishes to plead, 'never received,' and tenders his law, he will be estopped of his law by the specialty proving the receipt," but some were of contrary opinion. In the neat phrase of Mr. Justice Holmes (The Common Law, 262), "if a man *said* he was bound, he *was* bound."

[32] Tenures, sect. 375.

[33] This notion of estoppel is illustrated in Pollock & Maitland, II, 205–222, *passim*. It is still seen in Sheppard's day: Touchstone, c. 14 (in deeds, "an estoppel doth bar and conclude either party to say or except anything against anything contained in it").

[34] It has been noted, in Pollock & Maitland, II, 219, as occurring in Bracton and elsewhere, e. g. Y. B. 33–5 Edw. I, pp. 331, 547 (1306). In the Digest, it appears in *de solutionibus*. 46, 3, 80, and also in *de diversis regulis*, 50, 17, 35 (Ulpian: "Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est; ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrario consensu tollitur").

bond is no discharge.[35] But in its present relations it serves to introduce and emphasize the operative notion of a writing. Once concede the possibility that a sealed document may be indisputable, and then this other idea will expand and reënforce the former in every direction. In particular, the sealed instrument will "discharge" and "determine" any prior transactions, whether really separate and distant in time, or practically contemporaneous. In other words, the sealed instrument will not merely *prove* the transaction, but rather, by replacement, will now *be* the transaction. This theory was struggling for ascendency in the 1400s. For example, in 1422, where the plaintiff sues for money given on account, and the defendant asks for profert of the deed of acknowledgment given by him, and argues that the deed superseded everything else, just as a bond for 20 £. would have discharged a prior simple contract for the same, the plaintiff, replying, concedes the case put, "for the contract and the bond are two different contracts, and by the greater I am discharged from the less; but in the case of this receipt of money, and the deed which proves its receipt, there is but one contract," i. e. a contract by delivery of the money, the deed being merely evidence.[36] Again, in 1460, "if I make a contract [of loan] by deed indented, I shall not be compelled to count on the indenture; for the contract is not 'determined' by the indenture, but continues [as independent], and a man may elect how he will bring his action,"[37] —although if he had chosen to bring it on the deed, its terms could not have been disputed.[38] Here appears plainly enough the idea of the indisputability of the document co-existing with the idea that the transaction is something independent of the

[35] 1542, Waberley *v.* Cockerel, Dyer 51 (payment of a bond is no discharge; "although the truth be that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact").

[36] Y. B. I H. VI, 7, 31; cited in Thayer, Prelim. Treat. 394.

[37] Y. B. 39 H. VI, 34, 46; cited in Thayer, *ubi supra.*

[38] 1439, Y. B. 18 H. VI, 17, 8 (where a lease is by deed, and action brought on it, "the foundation of my action, which is a specialty, is so high in its nature that it cannot be destroyed by anything except a thing of as high a nature as it is, such as a release").

document and is merely proved by it; and yet the notion that the document "determines" and merges the whole transaction is winning its way. For two centuries to come this mode of speech—that the writing "dissolves," "discharges," "determines," or "destroys" all other prior or co-existing transactions—is predominant in expounding the theory of the rule.[39] The way is thus prepared for the modern idea of operativeness, forming the third stage of the rule's history.

III. However, one step still remains to be taken. As yet—say, in the 1500s—this theory is applicable to "matter of a higher nature," i. e., specialties, sealed documents, and *not to writings as such.* How and when did this last extension of ideas occur?

The Statute of Frauds and Perjuries, in 1678, seems to mark the modern epoch's full beginning. The result was predetermined by the influences already mentioned, and this statute appears of course as the mark rather than the cause of the final development. But still its scope was limited; and it had a really causal influence of its own as a plain example serving to expand and familiarize a general idea.

That example was furnished by the first and third sections, in which the estate was spoken of as "put in writing" and as "assigned, granted, or surrendered, * * * by deed or note in writing." Here were two notable features, practically novel in this relation. The legal act was to be

[39] 1605, Countess of Rutland's Case, 5 Co. Rep. 26 ("every contract or agreement ought to be dissolved by matter of as high a nature as the first deed; * * also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory"); Circa 1610; Burglacy *v.* Ellington, Brownl. 191 (title to land by deed of bargain and sale, alleged to be void for usury; plea that the buyer orally agreed that the seller could keep the rents; the counsel for the deed's validity "put that maxim that everything must be dissolved by that by which it is bound, and his whole argument depended upon that"; notice that he was evidently relying on the phrase of Ulpian, quoted *supra*, note 34); 1696, L. C. J. Holt, in Falkland *v.* Bertie, 2 Vern. 334, 339 ("the last will * * must be admitted sufficient to repeal all former wills, and much more to control all parol declarations"); *ante* 1726, Gilbert, Evidence, 279 (a release under seal is a good discharge of an account, for "any deceit or mistake in former payments is but matter in *pais*, and therefore not of as high a nature as the deed; and in giving evidence, everything must be contradicted by a matter of the same notoriety as that whereby it is proved").

constituted, not merely proved, by the document, and the document might be an ordinary writing, not necessarily a "deed", i. e., under seal. It is true that these features were not absolutely without precedent. There had been already two other statutes,—one in 1535, requiring a transfer by bargain and sale to be "made by writing,"[40] and the other in 1540, permitting freedom of devise of lands by "last will and testament in writing."[41] But the former statute had required the writing to be a deed, "indented and sealed," so that in this respect it involved no novelty; and the latter statute was as yet so little conceived from the modern point of view that in its construction the Courts had preserved rather the old testimonial idea, and had virtually treated the testator's oral utterance as merely evidenced by the writing.[42] The contrast between this attitude of the 1500s and the attitude of a century later is seen in the corresponding provision (sect. 5) of the statute of frauds, which requires devises of land to "be in writing and signed, * * * or else they shall be utterly void and of none effect." The lingering of the old, also, and its meeting with the new, are to be seen in the same statute's provisions about trust estates; for the creation of these, (by sect. 7) "shall be manifested and *proved* by some writing signed, * * * or else they shall be utterly void and of none effect," while their assignments (by sect. 9) "shall likewise *be* in writing signed, * * * or else they shall likewise be utterly void and of none effect." The contrast between the two ideas is further apparent in the phrases of sect. 4 ("unless the agreement, * * * or some note or memorandum thereof, shall be in writing"), which distinctly signified that the contract and the writing might be separate things.

The significance of the statute for the present purpose, then, was in the main, first, that it abolished the practice of creating estates of freehold by oral livery of seisin only, and, secondly, that it permitted the required document (for

[40] St. 27 H. VIII, c. 16. [41] St. 32 H. VIII, c. 1, § 1.

[42] Sheppard's Touchstone, 406 ("If the notary do only take certain rude notes or directions from the sick man, which he doth agree unto, and they be afterwards written fair in his life-time, and not showed to him again, or not written fair until after his death, these are good testaments of lands").

leases) to be a writing without seal.[43] By the former, it emphasized the constitutive (as opposed to the testimonial) nature of the document; by the latter, it extended the conception of constitutive documents beyond sealed ones to include all writings. The scope of these provisions was limited; but their moral and logical influence was wide and immediate. The statute now began to be appealed to, in all questions of "parol evidence," as setting an example and typifying a general principle.[44]

The important consequence was that for that great mass of transactions which were not affected by the statute, but were none the less put into writing by the parties, though not sealed—i. e. transactions for which by the older idea the writing would merely have been "evidence"—, the writing now came to be treated and spoken of as the constitutive thing. The modern view had come into complete existence; and the period of this seems to be about the end of the 1600s.[45] There are still recurring traces of the older theories;[46] but the modern result is practically achieved. The chancellor's court seems to have been slow to accept the full doctrine,—partly, no doubt, because of the older idea that it had something to do with the untrustworthiness of juries,[47] but also partly because the chancery court was still invoked as having a discretionary power to relieve

[43] These effects have been clearly analyzed in Mayberry *v.* Johnson, 3 Green N. J. Eq. 116.

[44] E. g.: 1696, Falkland *v.* Bertie, 2 Vern. 333 (proof of the testator's parol intention contrary to the legal effect of his will was excluded; L. C. J. Holt said that "the great uncertainty there is of proof in this case shows how necessary it was to make the statute against frauds and perjuries"); 1708, Strode *v.* Russell, 2 Vern. 621 ("No parol proof or declaration ought to be admitted out of the will to ascertain it; * * * and now since the statute of frauds and perjuries, this is stronger, because by that statute all wills are to be in writing"). Compare also Chief Baron Gilbert's remarks, about the same period, quoted *supra*, note 21.

[45] 1719, Lilly's Practical Register, 48, as quoted in Viner's Abridgment, "Contract," G, 18 ("If an agreement made by parol to do anything be afterwards reduced into writing, the parol agreement is thereby discharged; and if an action be brought for the non-performance of this agreement, it must be brought upon *the agreement reduced into writing*, and not upon the parol agreement; for both cannot stand together, because *it appears to be but one agreement*, and that shall be taken which is the latter and reduced to the greater certainty by writing; for *vox emissa volat, litera scripta manet*").

[46] As in the passages from Lilly and Gilbert, *supra*, and in Benson *v.* Bellasis, *infra*.

[47] See Strode *v.* Russell, *supra*, note 27.

against fixed rules of law.[48] But this inconsistency of practice soon disappeared; and the transition-period of four hundred years was accomplished. A legal transaction when reduced in writing was now to be conceived of as constituted, not merely indisputably proved, by the writing, —and this whether the writing was a requirement of law or merely voluntary, and whether it was sealed or unsealed. The reminiscence of the older idea, in the use of the term "parol evidence," to designate that which was legally inoperative, still persisted as a convenient term of discussion; but the correct legal theory, whenever it has been forced into consideration, has not failed to be avowed.

It remains to notice the development of the older conception in one other direction but to the same end. The king's word, it has been seen, was incontestable, and this quality attached itself to his sealed sanction of documents.[49] But, long before this, it was also conceived to sanction the indisputability of his judges' reports of their

[48] 1673, Tyler *v.* Beversham, Rep. temp. Finch 80 (deed of conveyance of a farm; the oral agreement was much considered, and apparently became decisive); 1673, Feilder *v.* Studley, ib. 90 (covenant in deed, not enforced); 1673, Cheek *v.* Lisle, ib. 98; 1674, Garnan *v.* Fox, ib. 172; 1681, Fane *v.* Fane, 1 Vern. 30 ("One may aver a trust of personal estate," here upon testimony to the testator's intention); 1681, Lee *v.* Henley, ib. 37 (a scrivener's mistake in a settlement of land, in the nature of a will, was not allowed to be corrected); 1684, Beachinall *v.* Beachinall, 1 Vern. 246 (a deed of marriage-settlement, proved to have been "not drawn according to the agreement," was ordered by L. C. Nottingham to be "left out of the case"; but this decree was reversed by L. Keeper Guilford, to the extent of letting the deed be "given in evidence" at the trial at law); 1681–5, Benson *v.* Bellasis, 1 Vern. 15, 369 (deed of marriage-jointure; a parol agreement "made on the marriage" was set up; L. C. Jeffries said that "the jointure-deed is an evidence that all the precedent treaties and agreements were resolved into that"; but afterwards he increased the jointure "on evidence of her father and uncle that B., [the husband,] when he proposed the treaty of marriage, offered to settle £500 per annum jointure; * * * but note, there was no [written] covenant or agreement proved whereby he bound himself to make a jointure of that value"); 1686, Harvey *v.* Harvey, 2 Ch. Cas. 180 (similar agreement of marriage-settlement allowed to overturn a deed); 1689, Towers *v.* Moor, 2 Vern. 98 (a testator's instructions were not received to show a mistake in a will; "we cannot go against the act of parliament"; but in case of a surrender made [on the roll] by a steward of a copyhold, "if there be any mistake there, that is only a matter of fact, and the courts of law will in that case admit an averment that there is a mistake, etc., either as to the lands or uses"); 1706, Hill *v.* Wiggett, ib. 547 (good example of the overturning by parol of such a copyhold-transfer).

[49] *Supra*, p. 342.

judicial doings.[50] Their *recordatio* (recollection or relation), oral though it be, is made indisputable. The progress of this doctrine is acutely traced in the following passage:

Sir F. *Pollock* and Mr. F. W. *Maitland*, History of the English Law, II, 666: "The distinction that we still draw between 'courts of record' and courts that are 'not of record' takes us back to very early times when the king asserts that his own word as to all that has taken place in his presence is incontestible. This privilege he communicates to his own special court; its testimony as to all that is done before it is conclusive. If any question arises as to what happened on a previous occasion the justices decide this by recording or bearing record (*recordantur, portant recordum*). Other courts, as we have lately seen, may and, upon occasion, must bear record; but their records are not irrefragable; the assertions made by the representative doomsmen of the shire-moot may be contested by a witness who is ready to fight. We easily slip into saying that a court whose record is incontrovertible is a court which has record (*habet recordum*) or is a court of record, while a court whose record may be disputed has no record (*non habet recordum*) and is no court of record. In England only the king's court—in course of time it becomes several courts—is a court of record for all purposes, though some of the lower courts 'have record' of some particulars, and sheriffs and coroners 'have record' of certain transactions, such as confessions of felony. In the old days, when as yet there were no plea rolls, the justices when they bore record relied upon their memories. From Normandy we obtain some elaborate rules as to the manner in which record is to be borne or made; for example a record of the Exchequer is made by seven men, and, if six of them agree, the voice of the seventh may be neglected. In England at a yet early time the proceedings of the royal court were committed to writing. Thenceforward the appeal to its record tended to become a reference to a roll, but it was long before the theory was forgotten that the rolls of the court were mere aids for the memories of the justices; and as duplicate and triplicate rolls were kept there was always a chance of disagreement among them. A line is drawn between 'matter of record' and 'matter in pays' or matter which lies in the cognizance of the country and can therefore be established by a verdict of jurors."

As the art of keeping the written records developed, and the practice of indisputability became trite, it might have been supposed that the constitutive feature of these writings would have developed early. But it is late in appearing; the record is usually said to "import absolute

[50] Brunner, Schwurgerichte, 189; Rechtsgeschichte, II, 523; Wort und Form im altfranzösischen Prozess, republished in his Forschungen z. Geschichte des deutschen und französischen Prozess, 269 (quoting the maxim, "Ne contre recort ne puet en riens fère").

verity";[51] but no further progress is for a long time made. And naturally enough; for any other theory, however necessary, is here palpably artificial. When a seller orally names a price and then writes it in a contract, it is easy to conceive of the writing as displacing the oral utterance and constituting alone the act. But when a counsel files a pleading or makes a motion, or a jury renders a verdict, it is plain that the clerk's act of writing is an actually separate thing from any of these. Only for the utterances of the judge himself is it entirely natural to think of the record as *per se* his own act. Nevertheless, in the end, the most practical and easily handled notion is that which identifies the record with the proceedings. This theory has finally prevailed,[52] and the notion of a constitutive writing is now extended to include the record of a judicial proceeding.[53]

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[51] 1628, Coke upon Littleton, 260*a* ("*Recordum* is a memoriall or remembrance in rolles of parchment of the proceedings and acts of a Court of justice * * * . And the rolles, being the records or memorialls of the judges of Courts of record, import in them such incontrollable credit and veritie as they admit no averment, plea, or proofe to the contrarie; * * * and the reason hereof is apparent, for otherwise [as our old authors say, and that truly] there should never be any end of controversies, which should be inconvenient").

[52] 1774, L. C. J. Mansfield, in Jones *v.* Randall, Cowp. 17 ("The minutes of the judgment are the solemn judgment itself"); 1846, Nisbet, J., in Bryant *v.* Owen, 1 Ga. 355, 367 ("The record is tried by inspection; and if the judgment does not there appear, the conclusion is that none has been rendered").

[53] The history of the two other chief instances of the application of the principle, negotiable instruments and records of corporate proceedings, is beyond the present purview.